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RESPECTING THE PRIVILEGE AGAINST SELF-INCrimINATION: A CALL FOR PROVIDING MIRANDA WARNINGS IN NON-CUSTODIAL INTERROGATIONS

Rinat Kitai-Sangero*

INTRODUCTION

Although the privilege against self-incrimination is recognized in most countries, it has always been controversial. Many jurists and scholars have wondered whether the right is essential in an uncoerced interrogation. In the United States, however, the Supreme Court has held that it is a fundamental right and essential to a fair trial. The seminal holding of Miranda v. Arizona, that suspects in custody must be apprised of their right to silence and counsel, represents the centrality of this right to American jurisprudence.

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1. Justice Harlan stated in his dissenting opinion in Miranda v. Arizona that “society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.” 384 U.S. 436, 517 (1966) (Harlan, J., dissenting). In China, the law does not recognize the right to remain silent during interrogation, and no Miranda-type warnings are provided. Ira Belkin, China, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91–106 (Craig M. Bradley ed., 2d ed., 2007); Mark A. Godsey, Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad, 51 DUKE L.J. 1703, 1710, 1764 (2002). Additionally, after the initial interrogation, the suspect should be advised of his or her right to counsel. Belkin, supra, at 97, 101; Godsey, supra at 1764 n.272.


4. The “Miranda warning” includes warnings to the suspect of his or her right to remain silent, his or her right to consult with an attorney, either retained or appointed, and of the possibility that statements may be used in court. Id. at 444.
Nevertheless, *Miranda*’s holding has been eroded over time as courts have admitted evidence gained in the absence of the warnings. In addition, police interrogators may employ various means to interrogate suspects without providing *Miranda* warnings. Thus, “questioning outside *Miranda*” has become a common phrase. One way of avoiding the rigors of the *Miranda* holding is to interrogate a suspect in a prima facie non-custodial setting. Indeed, some training materials advise interrogators to notify suspects that they are not under arrest when the suspects seem unlikely to cooperate or waive their rights so as to bypass the conditions that trigger *Miranda* warnings.

Under *Miranda*, suspects are entitled to receive the warnings only when they are subject to a custodial interrogation. Interrogation is an explicit questioning or its “functional equivalent” relating to words or behavior that the police officer should reasonably expect would extract an incriminating confession from the suspect. The interrogation reflects an element of coercion beyond that inherent in the very arrest. Custody is a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” Neither police suspicions against the suspect nor the setting of the interrogation are material, in and of themselves, to

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12. Id. at 300.

an assessment of whether *Miranda* warnings are required.\(^\text{14}\) Thus, whether a suspect is in custody is an objective determination.\(^\text{15}\)

The question of when a suspect is in custody, and thus when *Miranda* applies, has been raised in a number of contexts.\(^\text{16}\) For instance, the U.S. Supreme Court and the Sixth Circuit have addressed whether interrogation of incarcerated suspects requires a warning.\(^\text{17}\) In *Mathis v. United States*, the U.S. Supreme Court arguably took the stance that prisoners are per se in custody.\(^\text{18}\) However, the Court declared in 2010 in *Maryland v. Shatzer* that “we have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue.”\(^\text{19}\) In 2011, the U.S. Supreme Court granted certiorari in the case of *Howes v. Fields*.\(^\text{20}\) Randall Lee Fields was questioned by police interrogators on suspicion of child sex abuse.\(^\text{21}\) At the time, he was serving a sentence of forty-five days in the county jail for disorderly conduct.\(^\text{22}\) He was taken from his cell to a locked conference room in the prison compound, but he was not handcuffed.\(^\text{23}\) The interrogators did not provide him with *Miranda* warnings.\(^\text{24}\) However, they informed him that if he was not interested in cooperating, he was free to leave the room.\(^\text{25}\) In the course of the interrogation, which lasted seven hours, Fields made incriminating statements that helped the prosecution gain his conviction in court.\(^\text{26}\) The Michigan Court of Appeals upheld Field’s conviction, holding that Fields did not have to be provided with *Miranda* warnings because he had been in custody on a separate offense unrelated to the


\(^{15}\) Berkemer, 468 U.S. at 421–22; Yarborough v. Alvarado, 541 U.S. 652, 662 (2004); see also Stansbury, 511 U.S. at 324.


\(^{17}\) For analysis of this issue see Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883 (1997).


\(^{19}\) *Maryland v. Shatzer*, 130 S.Ct. 1213, 1224 (2010).

\(^{20}\) 131 S. Ct. 1047 (2011).

\(^{21}\) *Fields v. Howes*, 617 F. 3d 813, 815 (6th Cir. 2010).

\(^{22}\) *Id.* at 816.

\(^{23}\) *Id.* at 815.

\(^{24}\) *Id.* at 816.

\(^{25}\) *Id.*

\(^{26}\) *Id.* at 815–16.
On petition for habeas corpus, the federal district court reversed. The Sixth Circuit Court of Appeals affirmed, ruling that *Miranda* applied any time a suspect was isolated for interrogation from the rest of the prison population.  

The question of what constitutes a custodial interrogation also arises in traffic stops and *Terry* stops, as well as in various other situations. The fact that this question has arisen in a number of circumstances points out that the line that the Supreme Court drew between custodial and non-custodial interrogations is not as clear as the Court might think.

This article argues that although custodial interrogation entails inherent pressures that act to weaken a suspect’s will to resist, *Miranda* should apply as soon as the interrogee has become the focal point of the interrogation because there is no significant difference between custodial and non-custodial interrogation in terms of the suspect’s ability to avoid coercion. Actually, non-custodial interrogations pose similar risks for defendants that the Supreme Court attempted to address by requiring *Miranda* warnings. Announcing to suspects that they are not under arrest and that they are free to end the interrogation whenever they want is not enough to protect them from being compelled to talk. Furthermore, the right to counsel, in addition to being an independent right, ensures the right to remain silent not only in custodial interrogations, but also in every situation in which a person is interrogated as a suspect. Without counsel, the chances that a suspect will incriminate himself unwillingly increase significantly. Finally, requiring *Miranda* warnings only in custodial settings subverts three strong rationales for the privilege against self-incrimination: casting the burden of proof upon the state, avoiding the pooling effect, and protecting the innocent from wrongful conviction.

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27. *Id.* at 818.

28. *Id.* at 822.


33. See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000). The pooling-effect theory was developed by Daniel J. Seidmann and Alex Stein. Under Seidmann and Stein’s theory, the right to silence indirectly protects innocent accused persons. *Id.* at 449. “Pooling” occurs when guilty accused persons lie rather than remain silent, thereby causing the erosion of the value of uncorroborated exonerating statements made by innocent people. *Id.* at 433.
Part I of this article briefly examines the impact of custodial detention on the voluntariness of confessions. Part II describes how and why interrogation of suspects leads to securing confessions. Part III considers the role of counsel both in safeguarding the innocent and in safeguarding the suspect from involuntary self-incrimination. Parts IV, V, and VI address the three aforementioned rationales for the privilege against self-incrimination. The article concludes that administering *Miranda* warnings should be part and parcel of every interrogation of a suspect.

### I. CUSTODIAL INTERROGATIONS WEAKEN A SUSPECT’S WILL

The Supreme Court assumed that the custody requirement would separate an interrogation containing compelling pressure from one that did not involve compelling pressure. The *Miranda* ruling was far-reaching. In stating firmly that interrogation in a custodial situation is by its very nature coercive, the Court went beyond the traditional test for confessions that focused on the voluntariness of the statement. The Court acknowledged that the environment of custodial interrogation is intended to suppress the will of the suspect and might lead to an involuntary confession. Despite this assertion, the Court sought to allow police interrogation while safeguarding the individual’s autonomy through the warning requirement. *Miranda*, therefore, did not proscribe custodial interrogations, but it did obligate the interrogators to inform suspects being questioned of their rights to remain silent and to consult with counsel. In the absence of these guarantees, it is presumed that the confession was obtained coercively.

A custodial setting can indeed break a suspect’s will power. Custody is a traumatic event. It isolates the suspect and does not allow him or her contact with family or friends, who can provide strength to cope with...

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34. Weisselberg, *supra* note 8, at 1547.
36. *Id.* at 457.
39. *Id.* at 498.
the interrogation.  

It cuts off the suspect from the routine of life, a dislocation that causes feelings of isolation and anxiety, leading to the development of dependence on the interrogators. Isolation intensifies tension and anxiety. By its very nature, custodial interrogation harms an individual’s autonomy. The suspect’s loss of autonomy makes it easier for interrogators to exert psychological pressure so that the suspect will cooperate with them, especially through making a confession. In addition, difficult custodial conditions, such as severe overcrowding and being locked inside the cell most of the day with no sunlight, act to break the suspect’s willpower. Furthermore, custodial situations make it easier for the police to employ tricks, such as exaggerating the nature and weight of the evidence against the suspect, who is unable to verify such statements while under arrest. It is no wonder, then, that custodial interrogations yield more confessions than do interrogations conducted when the suspect is at liberty to leave. In such custodial situations, confessions cannot be thought of as truly voluntary.

Sociological and psychological studies on obedience theories shed light on the dynamics of custodial interrogations. For instance, scholars point to people’s reflexive inclination to obey the demands of those in


42. Magid, supra note 17, at 929.


45. Penney, supra note 37, at 359.


50. Rosenberg & Rosenberg, supra note 37, at 110–11.
authority and how this inclination is strengthened in a custodial interrogation setting. Thus, police interrogation creates a psychological reality in which suspects view themselves as being in a position of submission to authority, similar to a slave. Suspects can behave irrationally because they perceive themselves as having been placed in a situation demanding blind obedience. This coercive state seriously affects their powers of judgment.

The Supreme Court stressed that “it was the compulsive aspect of custodial interrogation, and not the strength or content of the government’s suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning,” and that “the mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in non-custodial settings.” Further, the Fifth Amendment guarantees that “no person shall . . . be compelled in any criminal case to be a witness against himself . . .” At first glance, a non-custodial interrogation does not appear compelling: “When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.” Quite simple on the face of it, or so it would seem. When not under arrest or similar restraint, the suspect is not locked behind bars. He is not disconnected from family, friends, and life’s routine, and he is not incarcerated in a cell with malcontent inmates.

The U.S. Supreme Court itself recognized, however, that things are not so simple, and that every interrogation of a person suspected of a crime is a threatening situation. Nevertheless, the Court declined to expand *Miranda* to an interrogation that takes place in a non-custodial setting, holding that:

53. *Id.* at 52–53.
54. *Id.* at 52.
55. *Id.* at 51–53.
58. U.S. CONST. amend. V.
a noncustodial situation is not converted to one in which *Miranda*
applies simply because a reviewing court concludes that, even in
the absence of any formal arrest or restraint on freedom of move-
ment, the questioning took place in a “coercive environment.”
Any interview of one suspected of a crime by a police officer will
have coercive aspects to it, simply by virtue of the fact that the
police officer is part of a law enforcement system which may ulti-
mately cause the suspect to be charged with a crime. But police
officers are not required to administer *Miranda* warnings to every-
one whom they question. Nor is the requirement of warnings to be
imposed simply because the questioning takes place in the station
house, or because the questioned person is one whom the police
suspect. *Miranda* warnings are required only where there has been
such a restriction on a person’s freedom as to render him “in cus-
tody.” It was *that* sort of coercive environment to which *Miranda*
by its terms was made applicable, and to which it is limited.61

It is likely true that interrogations that take place while suspects are not
in custody are easier for suspects than custodial interrogation. However,
every interrogation of suspects, regardless of whether the interrogation
takes place in a custodial or non-custodial situation, creates a risk of com-
elled self-incrimination. Such an interrogation is conducted with the
goal of extracting a confession, and is often accompanied by manipulation
and tricks. Thus, as will be argued below, for these reasons, *Miranda*
should come into play in *every* interrogation of a person as a suspect.

II. NON-CUSTODIAL INTERROGATIONS INVOLVE THE SAME
COERCIVE TACTICS AS CUSTODIAL INTERROGATIONS

Every interrogation of a suspect aimed at securing a confession con-
tains inherently compelling pressures that might lead to self-incrimina-
tion, whether true or false, against the person’s will.62 A system that aims
to secure a confession creates “comfortable” conditions to achieve this
goal.

The privilege against self-incrimination notwithstanding, the crim-
nal justice system values confessions.63 The Supreme Court held that “ad-
missions of guilt are more than merely ‘desirable’... they are essential to
society’s compelling interest in finding, convicting, and punishing those

61. *Id.*
62. *See also* Bretz, *supra* note 9, at 239.
*HOUS. L. REV.* 1251, 1255 (1999) (reviewing *THE MIRANDA DEBATE: LAW, JUSTICE,
AND POLICING* (Richard A. Leo & George C. Thomas III, eds. 1998)).
who violate the law.” 64 Interrogation is a central tool of the investigation process, 65 and suspects whom the interrogators consider guilty are interrogated in order to extract a confession. 66 Upon securing a confession, interrogators often cease the investigation and consider the case closed. 67 In England, interrogations of suspects in custody were prohibited until 1964. 68 In contrast, custodial interrogations were a common practice in the United States, and accordingly coercive tactics were developed, and guidebooks written about extracting confessions. 69

There are a number of reasons that an interrogation focuses on seeking a confession. The suspect is available, sitting before the interrogator in the police station. Hence, a lazy interrogator does not have to look too deeply for incriminating evidence. 70 Convincing the suspect to confess is a fast, cheap way to resolve a crime. 71 Sometimes the police cannot

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69. Wolchover & Heaton-Armstrong, supra note 68, at 66.
70. Roscoe Pound, Law in Books and Law in Action, 44 AM. L. REV. 12, 17 (1910) (citing Sir James Stephen who said, “it is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.”); Young, supra note 48, at 473.
resolve a crime without a confession.\textsuperscript{72} Confessions provide information regarding all the surrounding circumstances of the offense.\textsuperscript{73} They may also be necessary to uncover other crimes committed by the suspect.\textsuperscript{74}

Additionally, confession evidence is prejudicial\textsuperscript{75} because it emanates from the accused person himself or herself.\textsuperscript{76} “The power of a confession stems from the assumption that people do not speak falsely against their own interests, and do not say bad things about themselves unless true.”\textsuperscript{77} If one admits to being an offender, then he or she presumably committed the offense.\textsuperscript{78} Additionally, by confessing, the suspect claims his or her own guilt, and thereby relieves the burden placed upon decision-makers and fact-finders. “Supposedly, by confessing, the accused is ritualistically accepting and submitting to all investigative and trial proceedings initiated against him, in particular, and submitting to the victorious society with which he is engaged in a duel, in general.”\textsuperscript{79}

Confessions play a major role in criminal proceedings generally and in the interrogation process in particular.\textsuperscript{80} The criminal justice system is actually “addicted to confessions.”\textsuperscript{81} Many suspects make full or partial

\textsuperscript{72} Magid, \textit{supra} note 17, at 930; White, \textit{supra} note 65, at 136.

\textsuperscript{73} See Fisher & Rosen-Zvi, \textit{supra} note 67, at 874.


\textsuperscript{75} Mandy DeFilippo, \textit{You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium}, 34 \textit{J. MARSHALL L. REV.} 637, 663, 672–73 (2001); \textit{supra} note 47, at 2815; \textit{supra} note 47, at 2815.


\textsuperscript{77} Fischer & Rosen-Zvi, \textit{supra} note 67, at 874; \textit{supra} note 47, at 2815.

\textsuperscript{78} See Fisher & Rosen-Zvi, \textit{supra} note 67, at 874; Richard A. Leo & Richard J. Ofshe, \textit{Missing the Forest for the Trees: A Response to Paul Cassell’s “Balanced Approach” to the False Confession Problem}, 74 \textit{DENVER U. L. REV.} 1135, 1143 (1997) (stating that “[t]he conventional wisdom that people do not confess to crimes they did not commit and that the American criminal justice system does not wrongfully convict innocents permits these injustices to occur.”).

\textsuperscript{79} Sangero, \textit{supra} note 47, at 2816.

\textsuperscript{80} See Fisher & Rosen-Zvi, \textit{supra} note 67, at 874.

\textsuperscript{81} \textit{Id.} at 893 (quotations omitted).
admissions of guilt against their interests. The evidentiary weight attached to confessions made during police interrogation is controversial. In the past, there was a clear preference for confessions over other kinds of evidence. Today, many continue to treat a confession of guilt during interrogation as the “queen of evidence,” even in the face of a denial of guilt in court and evidence of innocence. “The confession is a unique type of evidence that blinds both juries and judges.” According to this view, the confession is perceived as reliable evidence because an innocent and rational person’s confession, when there is no torture or other extreme condition, is counterintuitive. Furthermore, it is assumed that a confession normally emanates from strong feelings of guilt and from a desire to get things off the chest.

On the other hand, some view confessions in police interrogations with suspicion precisely because they act against a suspect’s interests, ex-

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83. See Van Kessel, supra note 14, at 4–6.


85. Fischer & Rosen-Zvi, supra note 67, at 872; Sanger, supra note 47, at 2794.


87. Sanger, supra note 47, at 2810.


posing them to shame, conviction, and punishment.\textsuperscript{90} Confessing to guilt, in this view, normally emanates from pressures that overbear the free will of the suspect because a rational suspect would not make a confession unless it came in the face of irrefutable evidence or in exchange for mitigation of the punishment.\textsuperscript{91} The frequency with which defendants against whom the evidence is weak are full of remorse in the police station, yet overcome their “pangs of conscience” at trial, casts further doubt on the validity of confessions during police interrogation.\textsuperscript{92} Far from the queen of evidence, in this view, a confession is the “empress of wrongful convictions.”\textsuperscript{93}

Despite this ambivalence among scholars, a confession in the police station commonly leads to conviction.\textsuperscript{94} Except for catching a person “red-handed” or having a videotape of the crime, a confession is the most incriminating and convincing evidence.\textsuperscript{95} As the Supreme Court held that:

\begin{quote}
A confession is like no other evidence... the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.\textsuperscript{96}
\end{quote}

Hence, although a confession may be beneficial to the soul, it is detrimental to the defense.\textsuperscript{97} It is no wonder that police interrogators are highly motivated to obtain this piece of evidence.\textsuperscript{98} The vast majority of confessions are obtained during interrogations and are not the result of sponta-

\textsuperscript{90} David A. Wollin, \textit{Policing the Police: Should Miranda Violations Bear Fruit?}, 53 \textit{Ohio St. L. J.} 805, 846 (1992); Sangero, supra note 47, at 2800 (citing also the position of Israeli Justice Dalia Dorner).

\textsuperscript{91} Seidmann & Stein, supra note 33, at 464.

\textsuperscript{92} \textit{Wolchover \& Armstrong}, supra note 68, at 11, 13 (stating that in the eighteenth and nineteenth centuries, grave doubts were raised in England as to whether true remorse stood behind most confessions).

\textsuperscript{93} Sangero, supra note 47, at 2800 (emphasis omitted).

\textsuperscript{94} \textit{Wolchover \& Armstrong}, supra note 68, at 8–9; Defilippo, supra note 75, at 659, 672–73; Van Kessel, supra note 14, at 113. For a different opinion, in which a confession is not decisive and its reliability is examined on its merits by a jury, see \textit{Laudan}, supra note 82, at 179–80.

\textsuperscript{95} Drizin & Leo, supra note 66, at 921.

\textsuperscript{96} \textit{Arizona v. Fulminante}, 499 U.S. 279, 296 (1991) (quotation marks omitted).


\textsuperscript{98} Sangero, supra note 47, at 2815–16.
neous statements.\textsuperscript{99} Confessions, therefore, cannot be divorced from the way they are obtained.\textsuperscript{100} And to extract confessions, interrogators employ various tactics.

In interrogations, psychological manipulations constitute a primary method of extracting confessions.\textsuperscript{101} There is the famous tactic of the “good cop–bad cop,” which may be played by the same person.\textsuperscript{102} This tactic plays on the suspect’s need for both love and punishment.\textsuperscript{103} Other interrogative tactics also exert psychological pressure on suspects and take advantage of their ignorance of the evidence against them.\textsuperscript{104} There are various tactics of maximization.\textsuperscript{105} The key principle in these tactics is to show confidence in the suspect’s guilt even without strong evidence.\textsuperscript{106} The interrogator tells the suspect that there is no point in denying guilt, since the evidence is overwhelmingly incriminating, and, therefore, sufficient for conviction.\textsuperscript{107} Still, the interrogator wants to hear the suspect’s side of the story in case there are mitigating circumstances.\textsuperscript{108} If the interrogators infer guilt from the suspect’s reactions (for example, the suspect denies guilt in a weak tone of voice), the interrogator prevents the suspect from repeatedly denying guilt in order to not allow the suspect to gain any psychological advantage.\textsuperscript{109} The interrogator may also reject all explanations offered by the suspect as nonsense,\textsuperscript{110} demonstrating disappointment and dissatisfaction with the suspect’s answers.\textsuperscript{111} The interrogator...

\textsuperscript{99} Wolchover & Armstrong, supra note 68, at 65.
\textsuperscript{100} Id.; see also Van Kessel, supra note 14, at 144 (“Perpetrators of crime generally do not walk into police stations and confess. Some initiative by police, such as arrest and questioning, is usually necessary to obtain an admission.”).
\textsuperscript{103} Donald A. Dripps, Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination, 78 J. Crim. L. & Criminology 699, 705 (1988).
\textsuperscript{104} For a broad description of these tactics, see Wolchover & Armstrong, supra note 68, at 68–79.
\textsuperscript{105} For this term, see Drizin & Leo, supra note 66, at 912.
\textsuperscript{106} Wolchover & Armstrong, supra note 68, at 69; White, supra note 65, at 151.
\textsuperscript{107} Wolchover & Armstrong, supra note 68, at 70.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 71.
\textsuperscript{110} Weisselberg, supra note 97, at 158; White, supra note 65, at 119–20.
\textsuperscript{111} Wolchover & Armstrong, supra note 68, at 77.
tor may blame the suspect for a more serious offense,112 and try to belittle him or her.113

Another common technique is to lie about the incriminating evidence against the suspect.114 Thus, the interrogator may say that the suspect failed the polygraph test, that the suspect’s accomplices confessed to their guilt, that the suspect was identified by the victim as the perpetrator, or that incriminating scientific evidence exists.115 Furthermore, the interrogator may try to persuade the suspect that his or her situation is hopeless.116 The interrogator may also attempt to convince the suspect of having committed the crime even if the suspect does not remember it.117

Interrogators also employ different techniques to minimize the moral seriousness of the offense.118 An interrogator may demonstrate fake sympathy and understanding by: (1) stating that anyone in the same situation would have reacted in a similar manner; (2) proposing a reasonable cause for the offense; (3) condemning others; (4) flattering the suspect’s courage; or (5) making the suspect believe that he or she can learn from his or her mistakes and that by confessing he or she will fare better in the future.119

The power of these techniques to elicit confessions must be juxtaposed against the possibility of false confessions. The danger of false confessions is well-known today.120 The conventional wisdom that only guilty suspects confess collapses in the face of reality.121 Innocent people with average intellectual and cognitive powers have wrongly confessed to guilt during interrogation.122 Researchers Leo and Ofshe estimate that “false

112. Id. at 73.
113. Id. at 79; Yale Kamisar, On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It, 5 OHIO ST. J. CRIM. L. 163, 187 (2007).
114. WOLCHOVER & ARMSTRONG, supra note 68, at 76; Hirsch, supra note 52, at 34–35; Ofshe & Leo, supra note 41, at 1008; Toney, supra note 65, at 430–31.
115. Young, supra note 48, at 429, 432.
116. Ofshe & Leo, supra note 41, at 986.
117. Id.
118. See Drizin & Leo, supra note 66, at 912.
119. JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 112 (1993); WOLCHOVER & HEATON-ARMSTRONG, supra note 68, at 70; Dripps, supra note 103, at 705; Young, supra note 48, at 431 (discussing a police interrogation manual that suggests an interrogator may say to an accused rapist that it was indeed difficult to avoid his act if he wanted to have intercourse with the woman raped).
120. ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY 118 (1994); see also Feld, supra note 44, at 222; Sangero, supra note 47, at 2794.
121. See Leo & Ofshe, supra note 78, at 1143.
122. Drizin & Leo, supra note 66, at 920.
confessions occur regularly.”123 There is no exact empirical data, nor can there be, regarding false confessions in general, and false confessions that led to wrongful convictions in particular, since it is impossible to expose all such cases.124 Nevertheless, following the widely publicized exoneration (through the use of DNA evidence) of defendants who have falsely confessed, the problem can no longer be ignored.125

In an era of psychological interrogations, when no physical pressure is exerted, some are skeptical that interrogation techniques could lead an innocent person to confess guilt, especially when the outcome could be prolonged imprisonment, or even a life sentence.126 But the reality of police interrogations, unfamiliar to many of these skeptics, proves the falsity of such intuitions.127 After all, modern interrogation techniques “intended for the guilty . . . are psychologically powerful enough to elicit confessions from the innocent.”128 A continuous interrogation lasting several hours in which various techniques of brainwashing are applied may cause suspects to incriminate themselves out of despair.129 The pressure of extended and intensive interrogation may convince suspects that nobody would believe their claims and that conviction was inevitable.130 Innocent persons who confessed to having committed an offense have recounted how they had been led to believe that their memory betrayed them.131

When an innocent person suspected of a crime faces what purports to be strong scientific evidence, the individual may relinquish any hope of maintaining his or her innocence.132

When police officers accuse someone of perpetrating a crime, they then do their best to secure a confession, often using a variety of techniques to overwhelm the suspect’s autonomy, judgment, and self-inter-

123. Leo & Ofshe, supra note 78, at 1137.
124. Duke, supra note 86, at 566; Fisher & Rosen-Zvi, supra note 67, at 875; Leo & Ofshe, supra note 67, at 431–32; Sangero, supra note 47, at 2797.
125. Drizin & Reich, supra note 88, at 634.
126. Drizin & Leo, supra note 66, at 910.
127. Id. at 910–11.
128. Id. at 918.
129. For the use of brainwashing techniques, see Weisselberg, supra note 97, at 156; see also O. John Rogge, Why Men Confess 13–30 (1959).
est. 133 All the techniques aimed at securing a confession that concerned the Miranda Court weaken a suspect’s will to resist. 134 These techniques, when employed in custodial settings, 135 may also be employed in non-custodial settings. Use of these techniques in non-custodial settings thus subverts the intent of Miranda and undermines the fundamental rights the Court sought to protect.

III. THE PRESENCE OF COUNSEL IS ESSENTIAL TO PROTECTING THE RIGHT TO REMAIN SILENT AND IS ALSO AN INDEPENDENT RIGHT

The right to protect oneself against self-incrimination obviously entails granting suspects a fair opportunity to exercise this right. In order to have a fair opportunity, interrogators must inform the suspect explicitly of the right to remain silent, of the right to counsel, and of the possible ramifications of speaking. Even if the suspect is already aware of these rights, the announcement itself clarifies that police intend to respect the suspect’s rights, hence decreasing the coercive atmosphere of the interrogation somewhat. 136 Theoretically, being apprised of these rights allows suspects to understand the seriousness of their position and alerts them to the need to make careful statements. 137 Additionally, the assistance of counsel who can explain the right to remain silent is necessary to maintaining that right. 138

According to legal scholar Ronald Allen, the dispute around Miranda could not be decided without solving the constant debate between determinism and free will. 139 That is, whether a suspect maintains her ability to determine her conduct in spite of the circumstances, or whether the circumstances themselves exert pressures such that her will is overcome. 140 A total inability to elect certain conduct is

133. See Mark A. Godsey, Shining the Bright Light on Police Interrogation in America, 6 OHIO ST. J. CRIM. L. 711, 717 (2009).
134. See Bretz, supra note 9, at 239–40. In this regard, see Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (the interrogator falsely told the suspect that his fingerprints were found at the scene of the crime).
137. See Weissman, supra note 136, at 846.
138. See id. at 827.
140. See id.
rare. A driver who suffers a heart attack, loses control of the car, and causes an accident may be an example of such a case. Normally, however, a person retains this ability even though it may be very restricted, such as when a person acts under duress. In these cases, we do not speak of an inevitable choice, but of a choice that is severely restricted. We assume that a reasonable person would not be able to overcome his or her fear of death, and that this fear caused the individual to act unwillingly. In such a case, “the volition of the moment is more or less opposed to the permanent trend of the will; the self of the moment is more or less in conflict with the self as a whole.” Compulsion within the meaning of the Fifth Amendment is not tantamount to breaking the will, but it includes pressures that “overcom[e] the suspect’s unwillingness to talk.” In the context of confessions, the suspect’s free will is limited; though in the typical case, the suspect has a range of choices. The presence of counsel expands the range of choices for the suspect.

Suspects may have good reasons to waive the right to remain silent. Suspects are motivated to talk when they want to convince the police of their innocence and believe in their ability to do so. Even a guilty per-

141. See Kamisar, supra note 113, at 165 (stating that all conscious utterances are in some sense voluntary).
143. Stout, supra note 142, at 222–23.
144. Id. at 223.
145. See Schulhofer, supra note 136, at 452.
146. See Kamisar, supra note 113, at 165; see also Allen, supra note 139, at 77 (“A person who chooses to confess rather than endure yet more pain nonetheless chooses to confess.”). Allen tends to think that there is no real free will since our actions are dictated by “our genetic makeup and our past experiences.” Id. at 77–78. But certainly we make decisions despite our past experiences and learn to overcome internal inhibitions. Furthermore, if, as Allen suggests, our genetic makeup and past experiences determine our conduct, then no criminal liability should be imposed on a wrongdoer because the wrongdoer had no option to do otherwise. This theory of determinism is contrary to the fundamental ideas of our legal system regarding the ability to change one’s behavior and responsibility for one’s choice. See Michele Cotton, A Foolish Consistency: Keeping Determinism Out of the Criminal Law, 15 B.U. Pub. Int. L.J. 1, 1 (2005). Additionally, there is a philosophical opinion that the will is not a consequence of reason, but is the very reason for one’s actions. That is, the will is not subject to reason and explanation (Yeshayahu Leibowitz/Tony Lavi, Heaven, Above and Below: Philosophical Dialogues 17 (1997) (Hebrew)). Allen’s provocative essay, however, undoubtedly stimulates thought.
147. See Paul Shechtman, An Essay on Miranda’s Fortieth Birthday, 10 Chap. L. Rev. 655, 656 (2007); Thomas III, supra note 132, at 1095.
son can believe in his ability to convince the police he is innocent by lying. 148 Many suspects prefer to convey their version of events in an attempt to convince police that they are not guilty. 149 Some suspects talk in order to learn what the police know about them. 150 Giving one’s version of events while waiving the right to silence can, then, act to the suspect’s good. In contrast, waiving the right to silence without consulting with an attorney is not normally an act redounding to this person’s best interests. 151 Even an innocent suspect should prefer the advice of counsel. 152

The assumption that lies at the base of *Miranda* is that the right to confer with counsel is nothing else but an aspect of the right to remain silent. 153 The *Miranda* court based the suspect’s right to counsel in a custodial interrogation not on the adversarial right of representation itself, but on a suspect’s right not to incriminate oneself. 154 As stated previously, 155 interrogation while in custody is coercive by its very nature and exerts pressure on the suspect to talk. 156 An attorney is necessary to provide a countervailing weight to this coercive force and to balance the psychological pressures that inhere in this atmosphere. 157 The right to counsel is necessary, therefore, in order to protect the suspect’s privilege against self-incrimination while in custodial interrogation.

Furthermore, the right to counsel may be seen as an independent right, rather than a right that serves only to support the right to remain silent. In *Escobedo v. Illinois*, the Court stressed the right to representation by counsel as an independent right. 158 In *Escobedo*, the police prevented a meeting between Escobedo, suspected of murdering his brother-in-law, and his attorney, despite repeated requests by Escobedo and his attorney to meet. 159 In ruling that Escobedo’s confession was inadmissible, the *Escobedo* verdict emphasized the adversarial nature of individual-state relations. 160 The court attributed utmost importance to the point

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149. *See Schulhofer, supra* note 136, at 448, 456–57; *Shechtman, supra* note 147, at 656.
150. *Shechtman, supra* note 147, at 656.
154. *Id.* at 467.
155. *Supra, Part I.*
157. *Id.* at 466, 469.
159. *Id.* at 479–81.
160. *Id.* at 490–91 (relying on the Sixth Amendment).
at which the person becomes a suspect or focus of interrogation.¹⁶¹ Two years later, *Miranda* diverted the emphasis from the right to representation by counsel as an independent right to the right of a suspect not to incriminate oneself.¹⁶² *Miranda* held that that constitutional protection adheres only when a person is subject to custodial interrogation,¹⁶³ emphasizing that the right to remain silent is the only right that is in danger in custodial interrogations.¹⁶⁴

Legal scholars have insisted, however, that the right to counsel during interrogation stems from the adversarial system.¹⁶⁵ Being taken into custody is generally, but not necessarily, the first stage in which the state comes into confrontation with the individual.¹⁶⁶ In fact, any suspect is in an adversarial relationship with the state, even when not in custody. The emphasis of the *Miranda* Court on the right to counsel as only supportive of the right to silence fails to recognize the reality of when this adversarial relationship begins.

Since a person’s adversarial relationship with the state begins at the point the person becomes a suspect, an attorney’s advice is necessary at any interrogation, not just one that takes place in a custodial situation. Counsel can warn the suspect of possible interrogation tricks. Interrogators will be deterred more from using dubious means or from presenting the suspect with unreasonable demands when they know that the suspect is represented by counsel.¹⁶⁷ The attorney can explain the substantive law to the suspect.¹⁶⁸ Additionally, counsel may shore up the suspect’s spirit.¹⁶⁹ Anyone who has experienced aggressive cross-examination in court can easily imagine the techniques at work to create confusion and error in a suspect who is interrogated alone for hours, without coun-

¹⁶¹.  *Id.* at 490 (“[T]he investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect”).


¹⁶⁴.  *Id.*

¹⁶⁵.  Weisselberg, *supra* note 97, at 142.


sel, in a police station. The attorney’s role is to represent the suspect in a difficult situation, make it clear that this individual will not face the state alone, and to assist the suspect as his or her advocate. Thus, the attorney closes the gap of power between the suspect and the state.

An important aspect of this role is to explain to suspects their rights, principally the right to remain silent. Arguably, it is sufficient that the interrogators inform the suspect that he or she can put an end to the interrogation at any given moment, or that the suspect is not obligated to cooperate or respond to their questions. However, putting aside the tricks interrogators employ to cause suspects to waive their rights, such advice by police interrogators is not equivalent to advice by counsel. First, typically, an interrogator merely reads these rights to the suspect and no explanation of them is offered. There are even interrogators who briskly continue the interrogation immediately after reading the Miranda warnings. When the suspect’s heart is beating with fear in anticipation of the interrogation and its consequences, it is doubtful this person is able to digest the significance of the police interrogator’s laconic pronouncement of his rights. An attorney will not be satisfied just with an announcement of these rights. Like a physician who does not inform a patient of the possible types of treatment without explaining each of them and advising on the preferred treatment, so, too, an attorney will explain these rights to the suspect and advise whether the suspect should convey her version of what happened, maintain silence, or otherwise cooperate. Obviously, an attorney needs to hear the suspect’s story in order to give such proper advice. Equally as obvious is the fact that the suspect will not feel free to ask police interrogators questions, especially when those questions may themselves be detrimental and incriminating.

Moreover, it is very difficult to rely on police interrogators to respond with objective answers to suspects’ questions about their rights.

170. Schulhofer, supra note 136, at 437.
171. Michael C. Mims, A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana, 71 La. L. Rev. 345, 348 (2010) (discussing the parity between the state and the accused achieved with the right to counsel).
173. Cassell & Hayman, supra note 49, at 888 (explaining that interrogators generally read Miranda rights from written documents).
175. See Joseph T. Thai, Constitutionally Excluded Confessions: Applying America’s Lessons to a Democratic Iraq, 58 Okla. L. Rev. 37, 52 (2005); Van Kessel, supra note 14, at 140.
This is not because of ill will. Rather, there is an inherent conflict of interests between the interrogator’s desire to advance the investigation through extracting an incriminating confession and the interrogator’s duty to explain that the suspect has a right to refuse to cooperate in the investigation.176

Thus, the right to counsel should be recognized at any interrogation. An attorney’s presence is necessary to protect against the risk of coercion and guarantee that making a statement reflects the suspect’s willingness to talk. An attorney fulfills a special and irreplaceable role in defending the suspect’s privilege against self-incrimination. In addition, because a non-custodial interrogation is adversarial in the same way that custodial interrogations are, the right to counsel is an independent right that should adhere at the initiation of any interrogation. Finally, a situation in which a suspect is exposed to long interrogation under pressure and without counsel, even if non-custodial, undermines three central rationales that underly the privilege against self-incrimination. These rationales are discussed in the next part.

IV. LIMITING MIRANDA WARNINGS TO CUSTODIAL INTERROGATION SUBVERTS THREE RATIONALES BEHIND THE RIGHT TO REMAIN SILENT

Adversarial and inquisitorial criminal justice systems alike recognize the accused person’s privilege not to speak.177 This privilege is also granted to suspects and defendants accused of the most heinous crimes before the International Criminal Court.178 Various rationales have been offered to justify this common privilege.179 While there is no agreement on the rationale(s) underlying the privilege,180 three rationales appear to

176. Penney, supra note 37, at 381; Van Kessel, supra note 14, at 106.
180. Id.
be strong justifications for the privilege: bearing the burden of proof, avoiding the pooling effect, and the protection of the innocent. In examining these rationales, it will be shown why these rationales warrant providing Miranda warnings in any interrogation of a person as a suspect, even when the suspect is not in custody.

A. Bearing the Burden of Proof

Good public policy requires that the prosecution bear the burden of proof in establishing the defendant’s guilt beyond a reasonable doubt. Scholars conclude from the imposition of this heavy burden that the state also has the obligation to obtain evidence independently of the accused person’s own statements. Presumed innocent, the accused is under no obligation to prove innocence or to explain behavior. The accused may stand passive during the entire criminal process. Through silence, the accused person challenges the prosecution: “So prove your case, if you have any.”

If the burden of proving innocence was on accused persons, they would be compelled to choose between speaking and being convicted because in the typical case they would fail to meet the burden if they chose to remain silent. Even if the burden remains on the state, when an ac-

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181. See James C. Morton & Scott C. Hutchison, The Presumption of Innocence 112 (1987) (discussing the “bearing the burden of proof” rationale behind the right to remain silent and stating that “[t]he presumption of innocence forms a part of the broader privilege against self-incrimination. It is enough for an accused to plead not guilty . . . . The Crown cannot secure a conviction until it has proven its case—The Crown cannot rely on any expectation that the accused will testify”).

182. See Seidmann & Stein, supra note 33, at 480 (discussing the “avoiding the pooling effect” rationale behind the right to remain silent); see also Alex Stein, The Right to Silence Helps the Innocent: A Response to Critics, 30 CARDOZO L. REV. 1115 (2008) (also discussing the “avoiding the pooling effect” rationale behind the right to remain silent).

183. See Morton & Hutchison, supra note 181, at 112–13 (discussing the “protection of the innocent” rationale behind the right to remain silent); Danny Ciraco, Reverse Engineering, 11 WINDSOR REV. LEGAL & SOC. ISSUES 41, 67–68 (2001) (also discussing the “protection of the innocent” rationale behind the right to remain silent).


ased is compelled to speak, the emphasis of the proceedings shifts from the strength of the state’s case to the power of the accused’s response. Thus, compelling the accused to speak does not reverse the burden of proof, but it requires that the focus of the arguments at trial be on the reasonability of the accused person’s story rather than on the sufficiency of the evidence against the accused, hence undermining the notion that a conviction should emanate from the prosecution’s evidence. 187

Some scholars, however, refute the principle that requires the state to prove its case without use of the accused’s assistance. 188 They argue that placing the burden on the prosecution to prove the accused person’s guilt beyond a reasonable doubt does not require the prosecution to meet this burden in a certain way, and does not ban relying on the accused person for evidence. 189 In civil proceedings, the defendant may be called as a witness on the plaintiff’s behalf even though the burden to prove the claim is cast upon the plaintiff. 190 In criminal proceedings, the defendant, who bears the burden of proof regarding certain defenses, may meet the burden by relying upon the prosecution’s evidence. 191 The burden of proof does not lead necessarily, therefore, to a ban on compelling the accused person to provide explanations for the incriminating evidence.

Criminal proceedings, however, involve a dynamic between the accused and the state that is absent from civil proceedings. Although civil and criminal proceedings share the foundational notion that the one who makes a claim ought to prove it in order to prevail, criminal cases also involve the idea of the state as representative of society at large. 192 The state accuses the suspect of breaching the social compact. 193 Although it is a misconception that the accused person (even if guilty) is treated as an enemy, 194 the state nevertheless creates a conflict with the individual, and, therefore, it cannot resort to its adversary for help. The state must fight its own battle.

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187. EASTON, supra note 185, at 182; Penney, supra note 37, at 378–79.
188. Dolinko, supra note 179, at 1084.
189. Id.
190. I.H. DENNIS, THE LAW OF EVIDENCE 525–526 (3d ed. 2007) (among the litigants in trial, only the defendant in a criminal trial is not compellable as a witness); see also Donald A. Dripps, Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination, 78 J. CRIM. & CRIMINOLOGY 699, 721 (1988) (“no one suggests a privilege against testifying contrary to interest in civil cases”).
194. Young, supra note 48, at 460.
Thus, the expectation that a person will serve simultaneously as accuser and accused upsets the relationship between the individual and the state.195 The normal procedure in criminal proceedings is that the state accuses and those accused defend themselves. Coerced speech is antithetical to this structure. As discussed,196 counseling with an attorney enables suspects to fulfill their right to silence because the knowledge that the suspect is represented may deter the police from acting illegally, and the attorney may encourage the suspect’s spirit and assist him or her in coping with the interrogation and the detention. Therefore, counsel at the pretrial stage is necessary to ensure that the state would not bear its burden of proof by extracting a confession from the accused person against his will.

B. Sorting the Truth from the Lies: Avoiding the Pooling Effect by Ensuring the Right to Remain Silent

A relatively new theory by Alex Stein and Daniel Seidmann claims that, absent the right to silence, guilty suspects would lie.197 Lies by guilty suspects create what they call “the pooling effect.”198 The pooling effect is created when the frequency of lies told by guilty suspects, who do not have the option of silence, causes excuses by innocent defendants who cannot corroborate their story to sound like lies to interrogators and prosecutors. The more lies there are, the greater the pooling effect.199

According to this theory, the right to silence can lead to fewer wrongful convictions when examining the chances of convicting an innocent person in the absence of a right to silence, from an ex ante perspective, when the evidence of guilt is of intermediate strength.200 In this theory, the right to silence is justified in that it allocates the risks of error in a criminal trial in a manner that reduces the rate of wrongful convictions at the cost of increasing the number of erroneous acquittals.201 The pooling-effect theory shares the well-accepted assumption that only guilty persons invoke the right to silence.202 According to this view, rational innocent persons will speak up, whereas guilty persons may prefer to main-

195. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 31 (Henry Paolucci trans., 1963) (making this statement in the context of torture).
196. See supra notes and text accompanying notes 164–188.
197. See Seidmann & Stein, supra note 33.
198. Id. at 433.
199. Id. at 433, 449.
201. Seidmann & Stein, supra note 33, at 455.
202. Id. at 444, 452.
tain silent, since it is abundantly clear that guilty persons wish to conceal the truth, whereas innocent persons wish to reveal the truth. If suspects remain silent, we assume that they are guilty.

In this view, the right to silence helps to distinguish between factually guilty persons and factually innocent persons. It is rational for guilty persons to remain silent rather than lie, since lies may be positively refuted, and disclosures may complicate matters for accused persons and remove all reasonable doubt as to their guilt. In contrast, silence cannot eliminate a reasonable doubt that arises from the evidence. Therefore, in the absence of a right to silence, many criminals would choose the option of lying, creating an effect whereby the volume of lies overwhelms the explanations of the innocent. If, for example, twenty of every 100 suspects remain silent and eighty talk—forty of whom are innocent and forty of whom are guilty—abolishing the right to silence would result in sixty guilty persons who talk. Of those that talk, the majority (forty out of sixty) would lie, so proportionately more false stories would be heard. The increase in false stories increases the risk that innocent persons who cannot provide external evidence to corroborate their stories will be convicted. This is because, given awareness of the incentive for criminals to lie, the investigator’s inclination will be to treat the stories of accused persons with suspicion and to give little credence to an uncorroborated exculpatory statement, an outcome that will harm innocent persons.

When statements of accused people cannot be corroborated, abolishing the right to silence will create a tendency to treat all stories uniformly as unreliable. Stein and Seidmann assume that, in such a circumstance, suspects who have a strong alibi will not be harmed; rather, the requirement to speak would affect innocent suspects who offer an excuse that a liar could tell with the same degree of success, such as: “I was at home, and spoke with no one,” or, in a rape accusation, “she consented.” When police, prosecutors, and judges repeatedly hear the same uncorroborated version of innocence, they tend to treat such statements and protestations of innocence more suspiciously than if they have

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203. JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (1825).
204. Seidmann & Stein, supra note 33, at 444, 446.
205. Id. at 433.
206. Id. at 443.
207. Id. at 449.
208. Id. at 433, 439.
209. Id. at 457–58.
210. Id. at 480.
211. Id. at 462.
212. Id. at 459.
heard it rarely or less often. Guilty suspects who can legally remain silent waive the practical, although illegal, alternative of lying. In so doing, they help prevent a “pooling” effect and reduce the risk that an innocent person will be convicted.

From their point of departure that silence attests to guilt, Stein and Seidmann advance the position that it is wrong to apply pressure on criminals to lie instead of remain silent. Such pressure, they believe, may act to the detriment of innocent persons who provide a story, thereby imposing on them negative externalities. The right to silence may be justified in light of the assumption that criminals are the ones who make use of it, and, therefore, the right helps distinguish between guilty and innocent persons, to the benefit of the latter.

The avoidance of the pooling effect as a justification of the privilege against self-incrimination is not bereft of difficulties. First, some may argue that the pooling effect is marginal. Since there is no situation in which all guilty suspects remain silent and all innocent persons talk, and since there is incriminating evidence against both innocent and guilty persons, a pooling effect exists from the very fact that one person is a suspect. Interrogators may tend to treat any story by an accused person with suspicion. Insofar as it is dependent on whether or not interrogators hear forty or sixty false stories, the effect on an innocent person of whether the interrogator believes the story is marginal. Usually a case will not be decided based on the question of whether or not the interrogator believes the suspect’s alibi, but on the basis of the other evidence in the file. Second, the assumption that without the right to silence a guilty person’s lies would implicate him or her implies that an innocent person would be saved from wrongful conviction in the guilty person’s stead.

Third, for a significant pooling effect to occur, there must be a large number of guilty people who forego the right to silence and lie. Deontological arguments, such as the duty imposed on the state to prove guilt from independent sources without assistance from the accused person, are valid justifications for the right to silence even if only one suspect from among all suspects chooses to exercise the right. According to the

213. This emanates from the pooling-effect theory. See id. at 460–61.
214. Id. at 457–58.
215. Id. at 449.
216. Id.
pooling-effect theory, when fewer guilty suspects invoke the right to silence than lie, the danger that the abolition of the right to silence would create the pooling effect is blurred, up to the point of near negligibility. Thus, one study found that only 4 percent of the suspects chose to invoke their rights during custodial questioning.\footnote{Cassell & Hayman, supra note 49, at 859–60.} There is other data regarding different times and places,\footnote{Roger Leng, The Right to Silence Debate in: SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 25 (David Morgan & Geoffrey M. Stephenson eds. 1994) (fifty-seven percent of the represented suspects; twenty-two percent of the unrepresented suspects); Richard A. Leo, Criminal Law: Inside the Interrogation Room, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (twenty-two percent).} but the point is that the pooling effect is significantly different when there are, for example, four exculpatory statements as opposed to fifty exculpatory statements. If it is empirically proven that the pooling effect, as the result of abolition of the right to silence, is insignificant (for instance, if after public criticism of accused persons who remain silent a reduction occurs in the exercise of the right), then it would be very difficult to justify the right to silence under this theory.

Despite these reservations, the pooling effect is an interesting theory. According to this theory, the pooling effect exists in every interrogation of a person as a suspect, whether or not he or she is under arrest. If we want to encourage guilty suspects to remain silent rather than lie, and thereby avoid the negative impact of the pooling effect, suspects should be apprised of their right to silence and their right to consult with an attorney.\footnote{Stein and Seidmann note that their theory allows adverse inferences from pre-arrest silence only under circumstances “similar to res gestae.” Seidmann & Stein, supra note 33, at 489. However, in other non-custodial situations, then, “the self-incrimination privilege is necessary as an incentive for guilty suspects to separate themselves from innocent ones through silence.” Id.} Allowing guilty people to remain silent would permit the explanations of innocent people to be heard better without the clouding impact of the pooling effect.

C. The Truth Shall Set You Free? The Right to Silence Protects the Innocent

“Death and life are in the power of the tongue.”\footnote{Proverbs 18:21.} But is it true that a guilty person’s speaking would lead to destruction, whereas an innocent person’s speaking would lead to absolution? Under the traditional argument of the cruel trilemma, choosing among self-accusation, perjury, or
contempt of court, silence warrants the conclusion of guilt, since only guilty persons may benefit from its use.223

However, the assumption that rational guilty persons want to remain silent, whereas rational innocent persons want to talk, is an excessively broad generalization that does harm to the innocent. It is difficult to disagree with the assumption that guilty persons generally want to conceal the truth while innocent persons generally want to reveal the truth. But the statement that guilty persons want to remain silent while innocent persons want to talk in order to absolve themselves of guilt represents a conceptual leap unjustified by reality. In practice, most suspects—the guilty among them—choose to provide a story because of both the psychological pressure that is exerted by their interrogators and the natural need to try to remove the suspicions against them.224 Thus, even if we conclude that it is preferable for a rational guilty suspect who does not have a convincing story to remain silent, most suspects do not behave this way.

The perception that innocent people prefer to talk—since their natural response is to protest the false accusation leveled at them—is also not well-founded. An innocent person may have a strong incentive to remain silent for reasons unrelated to any desire to conceal a crime.225 Silence may emanate from the will to preserve one’s privacy, to evade embarrassment, to protect one’s security, or to cover-up for another person.226 Because of the difficult psychological situation in which the suspect is found during interrogation, the individual may be paralyzed from crying out his or her innocence because of a feeling of helplessness, confusion, tension, shock, anger or insult engendered by the very existence and nature of the interrogation and the fact that the interrogators do not believe the suspect’s story. Different people react differently to the same circumstances. Take, for example, Billy Budd, the protagonist of Herman Melville’s story, who was not able to speak in the face of the false and malicious accusation that Claggart, the ship’s master-of-arms, threw in his face:

“Speak, man!” said Captain Vere to the transfixed one, struck by his aspect even more than by Claggart’s. “Speak! Defend your-

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225. Ciraco, supra note 183, at 60.
226. Id. at 61.
self!” Which appeal caused but a strange dumb gesturing and gurgling in Billy; amazement at such an accusation so suddenly sprung on inexperienced nonage; this, and, it may be, horror of the accuser’s eyes, serving to bring out his lurking defect and in this instance for the time intensifying it into a convulsed tongue-tie; while the intent head and entire form straining forward in an agony of ineffected eagerness to obey the injunction to speak and defend himself, gave an expression to the face like that of a condemned vestal priestess in the moment of being buried alive, and in the first struggle against suffocation.227

Moreover, an innocent suspect may prefer to provide a false story if, in that person’s opinion, the truthful version is difficult to verify or may complicate matters rather than resolve them.228 For instance, in the case of a barroom brawl, it is reasonable to assume that some of the people who had no connection whatsoever to the brawl would prefer to deny the fact that they had been present at the time of the incident either for fear of being accused or for fear of getting involved in a trial against another person.

However, the right to silence may directly, not only indirectly, protect an innocent person from a wrongful conviction.229 An innocent suspect may simply forget things, and provide inaccurate statements because of memory weakness.230 An innocent person may be convicted at trial owing to reliance on confused or inaccurate statements made as a result of absentmindedness or lack of concentration, or even because his or her words could be interpreted in more than one way.231 Police do not systematically reveal incriminating evidence against the suspect at the interrogation stage, and, hence, the suspect may lack the opportunity to give a coherent story to explain away the evidence.232 The tension and pressure

229. Leng, supra note 220, at 27.
231. For such instances, see Findley & Scott, supra note 217, at 338.
of an interrogation, as well as the fear and excitement of the proceedings, may also lead to contradictions and self-incriminating responses. The accused person’s knowledge of his or her own innocence does not necessarily act to lessen the fear or even paranoia. Furthermore, not all innocent suspects are able to provide proper explanations. In such circumstances, it is easy to put words into the interrogated person’s mouth. Interrogation tactics may cause an innocent person to believe that the other side is acting against him or her and force him into a defensive posture. Consequently, an innocent person may think that the chances of exoneration increase with the choice to remain silent.

Scholars assume that a rational innocent person has an interest in telling the truth. According to this view, exercise of the right to silence or lying because of the fear of a wrongful conviction is irrational because it does harm to the innocent person’s interest to be acquitted at trial. Proponents of this view believe it is preferable for an innocent person to provide a true account of events, since only in the most extreme circumstances will the true story fail to create, at the very least, a reasonable doubt of guilt. Moreover, they claim that the hypothesis regarding the irrational behavior during interrogation is not supported empirically. These scholars support the idea that silence does not protect the innocent; on the contrary, they believe it strengthens the suspicions against them. Avoiding giving an explanation, in this view, is risky for the innocent.

Human behavior and legal dynamics belie this optimistic view. First, people do not always behave rationally. As discussed in Part II, innocent people not only do not protest against the false accusations, but they also confess to crimes that they did not commit. If we accept that innocent people can confess to a crime, why is it unacceptable

235. Leng, supra note 220, at 33.
236. Seidmann & Stein, supra note 33, at 444, 466–67.
237. Id.
238. Id. at 444, 466–67.
239. Stein, supra note 200, at 1131; see also Seidmann & Stein, supra note 33, at 450.
242. See supra Part II and notes and text accompanying notes 132–145.
that they choose silence? Irrational behavior often occurs under interrogation: “Police interrogation is a stressful situation that may call forth strange reactions.” 243 Second, our legal system recognizes the autonomy of an individual’s right to conduct the defense that seems fit to him or her. Third, the assumption that the true story will act to the benefit of an innocent person by undermining the body of seemingly incriminating evidence is overly optimistic. In many cases an innocent person was close enough to the incident or knows about it such that his or her responses may cause the interrogators not to believe the exculpatory aspects of the story and may bring about self-incrimination. 244 Take, for example, a case in which an innocent person has been mistakenly identified as the attacker. If this person admits to being at the scene of the incident, to standing in proximity to those involved in the skirmish, and to having a knife, which was taken away by someone there, these true statements may only add to the incriminating evidence. Namely, this person was at the scene when the brawl took place and the suspect’s own knife was used to stab the victim.

A good example that illustrates how statements made by suspects in their own defense may be used against them is the Israeli case of Margalit Har-Shefi. 245 Har-Shefi was convicted of the offense of not preventing the commission of a felony and was sentenced to a term of imprisonment. 246 The Israeli Supreme Court decreed that she knew of Yigal Amir’s intention to murder Prime Minister Yitzhak Rabin, but, contrary to statute, did not report this to the police. 247 Har-Shefi admitted that Amir had told her that he intended to murder Prime Minister Rabin. 248 She claimed, though, that she did not take his statements seriously, but viewed them as part of the many theoretical debates that she had previously had with Amir. 249 Jewish law includes din rodef (the law of the pursuer), which allows a person to kill someone if that person is attempting to kill you or another person. 250 Amir claimed that din rodef applied to someone who intended to hand over territory from the Land of Israel to non-Jews. 251 Har-Shefi asserted that she did not share Amir’s opinion that this law applied to

244. Amar & Lettow, supra note 233, at 874.
246. Id. at section 10.
247. Id. at section 95.
248. Id. at section 95–97.
249. Id.
250. Id. at section 63–65.
251. Id. at sections 62–63.
Prime Minister Rabin, and that she had argued with him on this matter. 252 She claimed that she would have tried to prevent Amir from fulfilling his intentions had she been aware that he was serious. 253 As proof, Har-Shefi said that she had approached a rabbi in her settlement of Beit-El for help in dealing with the points raised by Amir from the perspective of Jewish law. 254 The Israeli Supreme Court used this fact as a central reason for upholding Har-Shefi’s conviction, ruling that her discussion with the rabbi attested to the fact that she had known of Yigal Amir’s intention to murder the prime minister. 255 Thus, as this case illustrates, if a suspect is close enough to the event, there is a fear that the defense’s argument will be used against this person. Therefore, innocent people may incriminate themselves when they tell the truth; such cases are not so exceptional and the common belief that an innocent person would not be hurt by telling the truth is wrong, and dangerous. 256

Additionally, persons may be inaccurate in describing events. Imagine reporting to a friend about a debate with your boss or about breaking up with a boyfriend or girlfriend. Would the story you tell change from friend to friend, from time to time? Would you sometimes omit details, exaggerate others? It is often a natural human characteristic to do so. During an interrogation, however, every omission, every exaggeration, every lie that is caught would act to undermine one’s credibility, shake one’s confidence, and create the impression that the one’s guilt is a proven fact.

The discussion in this subsection indicates that it is impossible to discount cases—even if they do not reflect the norm—in which the right to silence is an essential tool for innocent persons to improve their chances of avoiding indictment or being acquitted at trial. The fact that it is impossible, under certain circumstances, to discount the contribution of the right to silence to the defense of an innocent person is enough to justify its existence. The cruel trilemma argument that is conceived as a defense for the guilty is also valid for the innocent who fears that his or her responses may lead to self-incrimination. The right to silence also supports the ability of the accused person to conduct his defense in the most appropriate way that, in his opinion, will avoid conviction. An attorney is the most appropriate figure to advise the individual to remain silent and in doing so may save an innocent suspect from wrongful conviction.

252. Id. at section 65.
253. Id. at section 10.
254. Id. at section 72.
255. Id.
256. Ciraco, supra note 183, at 67–68.
V. CONCLUSION

Every interrogation of a person suspected of a crime should trigger a *Miranda* warning. Announcing to the suspect that he or she is not under arrest and is free to terminate the interrogation at any time is insufficient to protect against coerced self-incrimination. When police interrogators focus their efforts upon a person suspected of a crime, that person is subject to a whole range of techniques aimed at securing a confession and that often convey the message that a claim of innocence will be ignored. Silence under such circumstances could be a means of defense, and may save an innocent suspect from making inaccurate statements or from making a confession out of despair. A defense attorney is the principal safeguard to protect a suspect’s privilege against self-incrimination in police interrogation. Denying *Miranda* warnings to suspects in a non-custodial setting conflicts with the main rationales underlying the Fifth Amendment.